United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7234

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT.

DOCKET NOS. 75-7234—7235—7236.

Docket No. 75-7234.

SAMUEL J. LEFRAK, et al.,
Plaintiffs-Appellees,

—against—

ARABIAN AMERICAN OIL COMPANY, et al.,
Defendants-Appellants.

Docket No. 75-7235.

ROCHDALE VILLAGE, INC.,
Plaintiff-Appellee,

—against—

ARABIAN AMERICAN OIL COMPANY, et al.,
Defendants-Appellants.

Docket No. 75-7236.

NEW YORK CITY HOUSING AUTHORITY,
Plaintiff-Appellee,

—against—

ARABIAN AMERICAN OIL COMPANY, et al.,
Defendants-Appellants.

On Appeal From the United States District Court for the Eastern District of New York.

BRIEF OF PLAINTIFFS-APPELLEES.

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Did the district court abuse its discretion when, based upon extensive affidavits and two plenary hearings, one of which was an evidentiary hearing at which live testimony of the four attorneys allegedly involved was received, it denied defendants' motion to disqualify plaintiffs' counsel?

COUNTER-STATEMENT OF THE CASE.

A. Preliminary Statement.

This appeal is taken by four of the eleven defendants in these actions,[1] Exxon Corporation ("Exxon"), Gulf Oil Corporation ("Gulf"), Texaco, Inc. ("Texaco") and Arabian American Oil Company ("Aramco") from an Order of District Judge Mark A. Costantino[2] denying their motion to disqualify David Berger, P. A. ("Berger firm") from continuing to represent the plaintiffs, Samuel J. Lefrak and all of the Lefrak family owned property interests, the New York City Housing Authority and Rochdale Village, Inc., in the three above captioned private antitrust actions and to enjoin David Berger, P. A., all associated counsel, plaintiffs and all other persons acting in concert with them from "stirring up claims" against defendants.

Appellants' Statement of Facts so misstates or mischaracterizes the evidence received below as to necessitate this Counter-Statement of the Case. Appellants alleged below that two law firms, David Berger, P. A. ("Berger firm"), and Wien, Lane & Malkin ("Wien firm"), conspired to solicit clients to join existing antitrust litigation against various oil companies. The solicitation was alleged not to be direct, but conducted principally through two real estate management companies, Sulzberger-Rolfe, Inc. ("Sulzberger company") and Douglas L. Elliman and Company ("Elliman company"), who wrote to the co-

1. Defendant Mobil Oil Corporation originally gave the Berger firm notice of its intention to file a similar motion, but never formally filed its papers in the district court and did not join this appeal.

2. Since the inception of the litigation, Judge Costantino has been assigned to these cases for all matters.

operative apartment house corporations they manage concerning the existing litigation. There was no evidence whatsoever that either of the law firms involved (1) authorized the alleged solicitation letters, or (2) knew of the alleged solicitation letters before they were mailed. The undisputed evidence, in fact, was to the contrary and established that the Berger firm did not even know the real estate firms which were involved and had no contact with them.[3] Moreover, the evidence conclusively shows that a long-standing attorney-client relationship existed between the Wien firm and the Sulzberger and Elliman companies and that all relevant conversations and letters between them were initiated by requests of the Sulzberger and Elliman companies.

Appellants in their statement of facts totally ignored the foregoing clear and conclusive evidence which was before the district court. Rather appellants excerpt only threads from the evidence and attempt to weave those threads out of context to allege misconduct. After careful consideration, the district court found that appellants failed in their attempt. All that is left for appellants to charge on this appeal is that the district court abused its discretion by not allowing the appellants to conduct their own trial below. As the record below reveals, the district court did not abuse its discretion; rather it conducted a judicially controlled investigation and evidentiary hearing until the court satisfied itself that no misconduct took place.

In the underlying three non-class action antitrust actions, plaintiffs allege that defendant oil companies illegally conspired to fix prices of petroleum and petroleum products, restrict their supply and allocate markets in violation of the Sherman Act, 15 U. S. C. § 1, thereby artifically raising the price of heating oil (63a-92a). The plaintiffs in these actions are owners of residential multi-dwellings located in the New York City Metropolitan area which purchase and

3. There is one exception to this, which took place more than six months prior to the alleged solicitation in question and under circumstances which were perfectly proper and correct. See *infra*, pp. 9-10.

use heating oil.[4] These actions had been the subject of several newspaper articles published in New York City and elsewhere.[5]

Defendants originally sought to disqualify plaintiffs' counsel because of two letters which were sent out from two real estate management companies to their long-standing clients, cooperative apartment house corporations ("cooperatives") which they manage (113a-115a, 120a-121a). *The cooperatives to which these letters were sent are not parties to this litigation.*

The first letter, dated February 6, 1975, was mailed from the Sulzberger company (113a-115a), a real estate management company, to the boards of directors of all of the cooperatives which it manages (172a-173a, 175a). The Sulzberger company letter appeared as follows (113a):

February 6, 1975

Dear Board President:

As you may have heard, a lawsuit has been brought by the Lefrak Organization against the major oil companies.

The suit is being prosecuted in the U. S. District Court for the Eastern District of New York by David Berger, Esq. and seeks treble damages under the Federal Anti-trust Act and damages for violation of the New York State's Anti-trust Law for claimed overcharges for fuel oil and electric fuel adjustment bill-

4. The three actions are entitled *Samuel J. Lefrak, et al. v. Arabian American Oil Co., et al.*, 74-C-1700 filed December 3, 1974, *New York City Housing Authority v. Arabian American Oil Co., et al.*, 75-C-15 filed December 24, 1974 and *Rochdale Village Inc. v. Arabian American Oil Co., et al.*, 75-C-135 filed January 29, 1975.

A fourth action asserting parallel antitrust claims, filed after Exxon filed its moving papers on February 21, 1975, is entitled *Harry B. Helmsley, et al. v. Arabian American Oil Co., et al.*, 75-C-467 ("Helmsley action"). This fourth action, filed March 31, 1975, is not the subject of defendants' motion to disqualify David Berger, P. A.

5. This Court can take judicial notice that these suits received publicity in both the *New York Times* and *Wall Street Journal.*

ings. The case is not a class action and only those who join the Lefrak Organization as plaintiffs will be entitled to share in the recovery. Mr. Berger is a highly qualified Philadelphia trial attorney who leads a firm which limits its practice to anti-trust and securities litigation.

The firm of Wien, Lane & Malkin has been retained as associated counsel with Mr. Berger on behalf of various residential property owners.[6] The action is being limited to residential property claims.

Counsel fees will be on contingent basis of one-third of any amount recovered by settlement or trial of the lawsuit. Any counsel fees awarded by the court will be deducted from the one-third contingency fee. Intervening parties are being asked to advance to Mr. Berger's firm the sum of $1.00 per apartment to be applied toward out-of-pocket expenses. Any unused portion of the advances will be returned to the parties proportionately.

The Complaint asks for millions of dollars in compensatory and punitive damages as well as injunctive relief against any further illegal conduct by the oil companies. The basic product involved in the lawsuit is heating oil used in residential buildings.

Many Boards of Directors of co-operative buildings in New York have already agreed to contribute $1.00 per unit in their buildings in return for receiving a proportion of the award which may be granted by the Court.

I am enclosing an agreement drawn by Mr. Berger. I suggest that this agreement be presented as soon as possible to your Board of Directors for possible approval. If your Board approves, please

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6. The firm of Wien, Lane and Malkin is associate counsel to the Berger firm in only one action, the Helmsley action, which is not the subject of the instant motion to disqualify by defendants (299a). (Footnote not part of the original text of the letter.)

return a signed copy of the agreement to me and I will take the necessary steps to have your building represented.

If you have any questions, I suggest you call William Lippman at Wien, Lane & Malkin (687-8700).

Sincerely,

Sulzberger-Rolfe Inc.
/s/ Norman Buchbinder

It was accompanied by an undated, unsigned letter on Berger firm letterhead which read as follows (114a-115a):

Re: Lefrak Organization, Inc. v.
Arabian-American Oil Company, et al.
74 Civ. 979

Pursuant to your request we agree to represent you as an intervenor plaintiff in the above litigation instituted on behalf of Lefrak Organization, Inc. against major oil defendants seeking, *inter alia*, treble and punitive damages for federal and state antitrust violations resulting from substantial overcharges for certain petroleum products and electric fuel adjustment billings.

We agree to render all legal services necessary for the representation of your claim for damages in the above litigation for which we and associate counsel, if any, shall be entitled to a contingent fee of 33⅓% of the amount received by you from defendants in damages, either by way of settlement or verdict or otherwise (after deduction for out-of-pocket expenses for which we will be reimbursed as set forth below). In the event the Court awards a counsel fee to be paid by defendants as a separate item over and above any recovery for damages sustained by you, such counsel fee shall be retained by us.

In order initially to defray the expenses of the litigation, you agree to contribute a sum equal to $1

for each unit in your buildings involved in your claims (each apartment or rental unit being regarded as a unit for this purpose). These expenses of litigation will include but will not be limited to such items as filing fees, costs

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of transcripts, duplication costs, long distance telephone calls, travel expenses, costs of depositions, computer services, expert services of economists, investigators, etc. We will keep you fully advised of these expenses from time to time as they are being incurred.

You will fully cooperate with us and furnish our lawyers and others working on this case with all necessary and appropriate information so that we may vigorously and properly represent your interests in this litigation.

Please be good enough to sign the copy of this letter for our files.

With all best wishes, I am,

Sincerely,

David Berger

DB/pw

Approved and Accepted:

_____ _____

Date

Sometime in February, another real estate management company, the Elliman company (159a-160a), sent a letter to the board of directors of its principals, also cooperative apartment house corporations, describing the pending oil antitrust litigation in similar terms to those used by the Sulzberger company (156a, 161a). No fee letter on Berger firm letterhead accompanied the Elliman company letter.

Counsel for appellant Exxon learned of these letters (111a-112a, 116a-118a) and without attempting to call the

Berger or Wien firms for an explanation, on Friday afternoon, Februray 21, 1975, Exxon filed papers in the district court and obtained an *ex parte* Order from Judge Costantino forbidding, pending hearing on the motion, the Berger firm, all counsel associated with the Berger firm in these cases and plaintiffs from initiating communications with any potential plaintiffs (105a, 126a-127a).[7]

The Judge scheduled a hearing on the motion for March 3, 1975 (211a). Just prior to that hearing, after intensive examination into the charges made by Exxon, plaintiffs' counsel filed seven affidavits, including affidavits of all the attorneys allegedly involved and all persons associated with the Sulzberger and Elliman companies named in Exxon's papers (155a-193a). These affidavits fully explained: (1) the origin of the Sulzberger and Elliman letters, (2) the attorney-client relationship between the Wien firm and the Sulzberger and Elliman companies, (3) the single contact the Berger firm had had with the Sulzberger company more than six months prior to the February 6 letter, (4) the lack of any contact between the Berger firm and the Elliman company, and (5) that all relevant communications between the Wien firm and Sulzberger and Elliman companies were merely communications between lawyer and client which resulted from the client's request for information.

Exxon filed an additional affidavit at this time containing information they obtained between February 21 and March 3 (249a-253a). The affidavit described three letters which were allegedly part of what the defendants contend is a scheme to solicit plaintiffs by the Berger and Wien firms. The first was a letter sent from an attorney, William J. Lippman of the Wien firm, to his client, Mr. Grotto of Brown, Harris, Stevens, Inc. ("Brown Harris"), another real estate management firm, describing the oil antitrust

7. The *ex parte* Order described above was actually the second *ex parte* Order entered that day. The first forbid counsel for plaintiffs from communicating at all with any potential plaintiffs (105a, 126a-127a).

litigation (252a-253a, 278a-279a). The second was an unsigned, unidentified and slightly excised copy of the Elliman company letter, addressed to Frank Karelson, Sr., Esquire, who is president (281a) of one of the Elliman company managed cooperatives (250a-251a, 255a, 281a). (All of the Elliman company managed cooperatives were sent the Elliman letter (156a)). The third was a cover letter from Frank Karelson, III, Esquire, the son of Frank Karelson, Sr., to Albert B. Ashforth, Inc. ("Ashforth company"), a real estate management firm, requesting that the letter which had been sent to his father be distributed to the principals, cooperative apartment house corporations, of the Ashforth company (254a).

At the March 3, hearing plaintiffs' counsel fully explained the origin of the Sulzberger and Elliman letters (234a-241a) and offered several times to place the four attorneys allegedly involved, David Berger ("Berger") and Stanley R. Wolfe ("Wolfe") of the Berger firm and William J. Lippman ("Lippman") and Ralph Felsten ("Felsten") of the Wien firm, on the witness stand to testify (232a, 234a, 241a). Counsel for Exxon, professing unpreparedness for the oral testimony, requested delay (241a). As a result, March 5 hearing date was set (242a).

At the March 5 hearing, the court itself conducted the examination. The Judge allowed counsel for Exxon to suggest to the court questions and avenues of inquiry (265a). Berger, Wolfe, Lippman and Felsten testified fully, answering all of the court's questions (Berger, 283a-288a; Wolfe, 289a-297a; Lippman, 271a-281a; Felsten, 298a-303a).

On March 11, Judge Costantino filed his opinion (357a-367a) containing a thorough analysis of the facts (359a-363a) elicited from two hearings in open court, one with oral testimony, and from the extensive affidavits which were filed. The court completely exonerated the Berger and Wien firms of all wrongdoing (366a), finding that "all communications by members of the Berger and Wien firms were made in compliance with instructions given by clients or in response to specific inquiries from clients or others" (364a).

B. The Letters: How They Occurred.

1. The Sulzberger Letter.

The Sulzberger company manages real estate interests owning over 150 properties in New York City (172a-173a). In late July, 1974, Edward Sulzberger, its president, first learned from Richard Lefrak[8] of an antitrust action brought by the Lefrak family real estate interests against the major oil companies ("Lefrak I") (173a). Richard Lefrak is a joint venturer with Sulzberger on a real estate project in New York City (172a-173a). Recognizing that the lawsuit affected his principals, the cooperatives, because they had been adversely affected by escalating heating oil bills, Sulzberger expressed interest in finding out more about the litigation (173a). Richard Lefrak told Sulzberger that he would ask his attorney, Berger, to call him in order to have him respond to Sulzberger's inquiries about the litigation (173a). As a result, Wolfe, another member of the Berger firm, called Sulzberger upon Richard Lefrak's advice that Sulzberger wished to learn more about the lawsuit (173a, 186a, 289a-290a). Wolfe was under the impression that Sulzberger was an attorney (186a). During this telephone conversation Sulzberger sought information from Wolfe concerning the nature of the litigation and the fee and cost arrangements relating to retention of counsel for representation in the litigation for all his personally owned real estate interests and those he manages through the Sulzberger company (173a, 186a, 290a). Sulzberger asked Wolfe to write him a letter setting forth this information in more detail (173a-174a). In direct response to Sulzberger's request, Wolfe, thinking Sulzberger an attorney,[9] wrote him a letter confirming the conversation and describ-

8. Richard Lefrak, a principal of the Lefrak real estate interests, is also an attorney who is local counsel in the Lefrak actions. The original Lefrak action, the one which Richard Lefrak mentioned to Edward Sulzberger was entitled *Lefrak Organization, Inc. v. Arabian American Oil Company, et al.*, 74-C-971 ("Lefrak I") and was filed July 2, 1974.

9. The fact that Wolfe thought Sulzberger was an attorney demonstrates that no scheme to solicit plaintiffs by the Berger and

ing the litigation (186a-187a). He also enclosed a copy of an unsigned, unaddressed letter bearing the caption "Lefrak Organization, Inc. v. Arabian American Oil Company, et al. 74 Civ. 979" that had been negotiated by the Berger firm with other clients in connection with Lefrak I and which set out a fee arrangement (pp. 5-6 *supra*, 173a-174a, 186a-187a, 189a, 286a, 290a). Wolfe did so because he believed the previously used fee letter was the most accurate way to describe the terms and conditions of representation (290a-292a).

Sulzberger, believing that the case was a class action took no further steps with respect to entering the litigation or communicating with the Berger firm (174a). After the letter of July 31, 1974 the Berger firm never had any contact or communication with Edward Sulzberger or the Sulzberger company (174a). Only when Exxon filed its papers on February 21, 1975 did the Berger firm communicate with Sulzberger in order to investigate Exxon's allegations (174a, 187a).

In January 1975, Sulzberger read in the newspaper that the New York City Housing Authority had filed a separate action against the major oil companies parallel in substance to the action already pending on behalf of the Lefrak interests (174a). He was also aware that Consolidated Edison Company of New York had started a separate lawsuit (174a). Putting these facts together, Sulzberger realized that he was probably wrong in his assumption that the Lefrak action was a class action. He then inquired of his counsel, Lippman, a member of the Wien firm, to find out whether the lawsuits were class actions (163a, 174a). Lippman has acted as counsel to the Sulzberger company

9. (Cont'd.)
Wien firms really existed as defendants contend. First, Wolfe did not even know exactly who Sulzberger was, and Wolfe mistook him for an attorney. Second, neither the Berger nor Wien firms followed up the Sulzberger contact in any way. In fact, the Berger firm had no further contact with the Sulzberger company (174a) and the Wien firm had no contact whatsoever with the Sulzberger company concerning this matter until Sulzberger made an inquiry to his counsel about the litigation in January, 1975 (174a).

and its president since 1969 (163a, 174a, 278a-279a). Learning from Lippman that the pending actions were not class actions as he had formerly believed, Sulzberger felt it was his duty to advise his principals, the cooperatives for which his company acted as managing agent, of the pending litigation and the need to consider commencing their own actions (164a, 174a). He requested Lippman to write him a letter summarizing both the status of the litigation and the term of the retainer agreement that might be made with Berger if Sulzberger's principals decided to commence litigation and retain the Berger firm (164a, 175a, 278a). Lippman wrote the requested letter on January 10, 1975 (166a-167a, 179a-180a, 278a).

After receiving Lippman's letter, Sulzberger instructed Norman Buchbinder, an officer of the Sulzberger company, to write to the boards of directors of the cooperatives managed by the Sulzberger company to apprise them of the litigation (170a-171a, 175a), and to enclose with that letter a copy of the Lefrak I fee agreement letter which he had received more than six months earlier as an attachment of Wolfe's letter to him dated July 31, 1974 (175a).

Buchbinder prepared his own letter on Sulzberger company letterhead, dated February 6, 1975, containing some of the language of Lippman's letter to Sulzberger, and along with the out-dated fee letter, sent it to the boards of directors of the cooperatives managed by the Sulzberger company (pp. 3-5 *supra*, 113a-115a, 191a-193a). The fee letter entitled Lefrak Organization Inc. v. Arabian American Oil Company, et al. was outdated because on January 10, 1975 Lefrak I was dismissed without prejudice by Order of the court below (156a).[10]

As the affidavits presented to the district court and the testimony at the March 5 hearing make clear, Buch-

10. The Sulzberger letter plus attachment was dated February 6, 1975. Wolfe had spoken to Sulzberger and sent him the letter describing a fee arrangement for Lefrak I on July 31, 1974. Plainly, Sulzberger had no contact with the Berger firm until after the Exxon motion was filed or he would have known that the fee letter referring to Lefrak I was obsolete at the time it was sent out.

binder and Sulzberger never received a request by any person in the Berger or Wien firms to recommend the Berger or Wien firms with respect to this litigation, never were given any authority to send out the letter with the attached fee letter, nor did Sulzberger and Buchbinder ever reveal their intentions to circulate the letter to their principals or show it to any member of the Berger or Wien firms before it was released (171a, 175a, 277a, 283a-285a). Accordingly, no one at the Berger firm discussed or knew of the February 6 letter until after it was sent out, nor did anyone at the Berger firm authorize use of the firm name, Mr. Berger's name or the outdated, unsigned fee letter attachment (Berger, 182a, 284a-285a; Wolfe, 187a, 292a-294a). Furthermore, Messrs. Lippman and Felsten of the Wien firm never authorized nor knew anything about the Sulzberger letter until after it was sent out. (Lippman, 164a; Felsten, 299a-300a). Lippman knew only that Sulzberger felt it his duty to inform his principals of the pending litigation (164a), but did not know a letter was sent out and did not furnish any form of retainer agreement on Berger firm letterhead or even know that the retainer letter was in Sulzberger's possession (164a).

Felsten first learned of the Sulzberger letter when Sulzberger, a client of the Wien office, sent him a copy of the letter after it was sent out to Sulzberger's principals (190a, 299a, 302a). Felsten then sent a copy of the Sulzberger letter with a transmittal letter dated February 11, 1975, to Berger and Wolfe (190a-193a, 302a). Berger did not know about Felsten's February 11 letter which enclosed the Sulzberger letter until February 28, well after the Exxon motion papers of February 21, were filed (182a-183a).[11] Wolfe first learned of the letter on February 18, 1975 when he received a carbon copy of the transmittal letter sent to Berger from Felstein of the Wien firm (187a).

11. Berger had left his office for Israel on February 14, 1975 for a meeting of the International Academy of Trial Lawyers (182a-183a, 285a). He did not see the Wien office letter until after he returned to his office February 28 (182a-183a).

Felsten's February 11 letter to Berger was a transmittal letter containing the Sulzberger letter and referring to communications between the Wien firm and its clients who had previously expressed interest in the heating oil litigation (187a, 190a-193a, 302a-303a). More specifically, Felsten's reference was to the Helmsley real estate interests which manage and own a great deal of property in New York (299a-300a). Felsten wrote the transmittal letter of February 11 to Berger because, since as early as October 10, 1974, the Wien and Berger firms had been co-counsel to the Helmsley interests in connection with the pending litigation (54a-55a, 286a-287a, 299a-300a). The need for continuing communications with respect to the Helmsley interests related to the interests which were owned in part by Harry B. Helmsley and with respect to which Helmsley needed his co-owners' consent to join the litigation.[12]

No additional plaintiffs have become clients of the Berger or Wien firms as a result of the Sulzberger circular, nor did the Berger or Wien firms know to whom it was sent, nor have there been any oral or written communication with anyone to whom they knew the circular may have been sent (165a, 278a, 288a, 292a-293a, 296a-297a).

2. The Elliman Letter.

John F. Hamlin is the president of the Elliman company which manages 92 cooperatives in the New York metropolitan area (159a-160a). In the Fall of 1974, the problem of constantly escalating fuel and utility costs was a source of great concern to all boards of directors of co-

12. The Helmsley real estate interests and Harry B. Helmsley, their principal, have been clients of the Wien firm for over twenty years (299a). Harry B. Helmsley owns in whole or in part through proprietorships, corporations and partnerships a great deal of real estate in the New York City metropolitan area (300a). Mr. Helmsley had retained the Berger and Wien firms to represent his interests in the pending oil antitrust litigation before October 10, 1974 (54a-55a, 286a-287a, 299a-300a). A separate but parallel suit representing the Helmsley interests entitled *Harry B. Helmsley, et al. v. Arabian American Oil Company, et al.*, 75-C-467 was eventually filed on March 31, 1975.

operatives and their managing companies (160a). Hamlin had read newspaper articles of antitrust lawsuits brought against the major oil companies by the Lefrak interests and those of the New York City Housing Authority (160a).

In January, 1975, Hamlin consulted with his attorney Lippman and asked whether he knew the details about the pending heating oil antitrust litigation (160a-161a, 164a-165a). Lippman has acted as special counsel to the Elliman company from time to time since 1968 (160a, 163a). Lippman gave Hamlin the same information he had previously furnished to Sulzberger (160a-161a, 164a-165a). Hamlin asked for a written summary and Lippman complied, sending him essentially the same letter as he had sent Sulzberger, inasmuch as the same information was requested (160a-161a, 164a-165a, 168a-169a).

Hamlin concluded, after receiving Lippman's letter, that he had an obligation to ask Elliman's principals, the boards of directors of the cooperatives managed by the company, whether they wished to join the litigation (161a). Irwin Gumley, vice president of the Elliman Company, was directed by Hamlin to send a letter, based on the information contained in Lippman's letter, to all boards of directors of the cooperatives they manage advising them of the pending litigation (156a).

The letter sent out by Gumley (120a-121a) was similar in content to the Sulzberger letter because it was based on the letter Lippman had sent Hamlin at the latter's request (161a). The Elliman letter was undated but apparently was sent out around the beginning of February, 1975 (117a). No fee letter was attached. Although the Elliman letter mentioned the Berger and Wien firms, no member of either firm authorized the use of the firm names nor requested anyone to recommend them as counsel in this litigation (156a, 161a, 165a, 182a, 188a, 280a, 293a). As was the case with the Sulzberger letter, no member of the Wien firm or the Berger firm discussed the letter, knew its contents, or saw it until after it was mailed (156a, 161a, 165a, 182a, 188a). In fact, there has never been any contact

between anyone at the Elliman company and any member of the Berger firm (182a, 188a, 296a-297a). The Berger firm first learned of the letter and its contents when it received a copy of the letter as part of appellant Exxon's motion papers filed February 21, 1975 (182a-183a, 188a, 284a-285a).

No additional plaintiffs became clients of the Berger or Wien firms as a result of the Elliman circular (165a, 299a, 296a-297a).

3. The Lippman Letter to Brown Harris Stevens, Inc.

The Wien firm is counsel to Harry B. Helmsley, who owns Brown Harris Stevens, Inc., a real estate management agent, similar to the Sulzberger and Elliman companies (252a, 279a). Brown Harris has been a client of Lippman's since 1957 (279a). Lippman wrote a letter dated January 13, 1975 to a Mr. Grotto, president of Brown Harris, who had telephoned Lippman asking for information about the pending heating oil litigation (278a-279a). Grotto told Lippman that he was calling to get the information because Harry B. Helmsley, the owner of his company, had requested that he do so (279a). The information requested by Grotto was approximately the same as that requested by Sulzberger; quite naturally, therefore, the letter written by Lippman was substantially the same as that written by Sulzberger (278a-279a).

The Lippman letter to Brown Harris is no more than a letter sent from a lawyer to his client upon the client's request for information.[13] Yet, defendants insinuate something unsavory about this letter by distorting its context and describing it as another part of the alleged solicitation campaign of the Berger and Wien firms (App. Br. p. 10).

13. The Brown Harris letter is no different than the Lippman letter of January 10 to Edward Sulzberger (166a-167a) and the Lippman letter of January 22 to John Hamlin of the Elliman company (168a-169a). All three letters were letters sent from a lawyer to his client upon the client's request for information (Lippman letter to Sulzberger, 164a, 174a-175a; Lippman letter to Hamlin, 161a, 165a).

4. The Karelson Letter to Albert B. Ashforth, Inc.

Frank Karelson, Sr., Esquire ("Karelson, Sr.") is president of one of the cooperative apartment house corporations that is managed by the Elliman company (281a). A letter was offered by Exxon (255a) addressed to Karelson Sr. that was identical to the Elliman letter except for deletion of the last sentence of that letter and the Elliman company signature line (250a-251a, compare 255a to 120a-121a). Since the Elliman company sent out a letter to the boards of directors of all the cooperatives it manages (156a, 161a) and since Karelson, Sr. is president of one of those cooperatives (281a), it is only natural that Karelson Sr. received the Elliman letter when it was distributed to Elliman's principals.

The letter addressed to Karelson Sr. was enclosed with a cover letter dated February 5, 1975 from Frank E. Karelson, III ("Karelson III"),[14] Karelson Sr.'s son, to the Ashforth company, a real estate management company which manages approximately 40 cooperatives (250a-251a, 254a-255a). Karelson III's cover letter to the Ashforth company suggested that the Ashforth company circulate the enclosed letter, which was the Elliman letter addressed to Karelson, Sr. with the last sentence and signature line excised, to all of the Ashford company managed cooperatives (254a). Obviously, Karelson III learned of the pending antitrust litigation from his father who received the Elliman letter because of his officership of an Elliman cooperative.

Berger knew nothing about and was not involved in any way with the Karelson letter to the Ashforth company (284a). At the March 5 hearing, Lippman testified that Karelson III has been his friend for twenty years and his father, Frank Karelson, Sr., Esquire was president of a cooperative that is managed by the Elliman company

14. Karelson III's cover letter was on the stationery of his law firm Karelson, Karelson, Lawrence and Nathan (254a). Karelson Sr. is a member of the same law firm (254a).

(281a). Lippman was asked directly by Judge Costantino at the March 5 hearing:

> Q. Did you at any time institute or initiate anything in having Mr. Karelson call you by suggesting to him that he should call you to try to get involved in this litigation?
>
> A. Never (281a).[15]

C. Relevant History of the Litigation.

On January 10, 1975, the same day that Lippman wrote to Sulzberger at Sulzberger's request about the pending antitrust actions, a hearing on the underlying antitrust actions took place before Judge Costantino (57a-62a). Wolfe made a statement at that hearing which defendants have totally misconstrued, misquoted (Compare 60a to App. Br. p. 4) and juxtaposed, in order to characterize inaccurately, to the unrelated Sulzberger and Elliman letters. Appellants' theory is that in January and February of 1975, a conspiracy between the Berger and Wien firms to solicit plaintiffs from the New York residential real estate market surfaced in the form of statements by plaintiffs' counsel in open court (60a) and the mailing of the Sulzberger and Elliman letters. The origin of the Sulzberger and Elliman letters has already been explained (Section D, *supra*). To understand how Wolfe's statements in open court are totally unrelated to those letters, a review of aspects of the origin of the lawsuit and its procedural history is necessary.

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15. After the Judge asked the above question of Lippman at the March 5 hearing, counsel for Exxon then requested the Judge to question Lippman on the positions held by him and Karelson III in the Association of Lawyers for Cooperatives and whether conversations between the two preceded the drafting of the letter to the Ashforth firm (282a). Since Lippman had directly testified that he had not instigated or initiated any action to have Karelson become involved in the lawsuit, the Judge concluded it was unnecessary and irrelevant to go into the organizational relationships between Lippman and Karelson or the conversations between people who had been friends for twenty years (282a-283a).

The Berger firm, which for many years before this litigation has acted as counsel to the Lefrak interests,[16] filed a lawsuit on the latter's behalf on July 2, 1974 entitled *Lefrak Organization, Inc. v. Arabian-American Oil Company, et al.*, 74-C-979 ("Lefrak I"). On September 3, 1974, motions to intervene were filed on behalf of Glenwood Management Corporation, Hillside Associates, Pickman Brokerage Agency and Forrest Hills South, Inc. (20a-50a), all of whom are clients of the Berger office. Judge Costantino deferred consideration of these motions to intervene (60a).

As Lefrak I developed, plaintiff's counsel determined that the named plaintiff, "Lefrak Organization Inc."[17] arguably was not the proper plaintiff, because it did not itself own property or use and pay for heating oil for which damages were being claimed. Arguably the Lefrak entities which owned property and did use and pay for heating oil should be the named plaintiffs. Plaintiffs then attempted to amend the complaint in Lefrak I (Rec. No. 47 at 74-C-979) to name each Lefrak owning entity as a separate plaintiff. When the decision on the motion to amend was held under advisement (Rec. No. 54 in 74-C-979), a second action, *Samuel J. Lefrak, et al. v. Arabian American Oil Co., et al.* ("Lefrak II") was filed on December 3, 1974 (63a-95a) on behalf of each Lefrak entity that owned property and purchased and paid for heating oil for its own use.

From December 3, 1974 until January 10, 1975, the two Lefrak suits, Lefrak I and Lefrak II, proceeded simultaneously. On January 10, the parties appeared before the court for a conference regarding future management of the lawsuits (Rec. No. 80 in 74-C-979). Both sides took the

16. The Lefrak property interests consist of many corporations, proprietorships, partnerships and a trust ("Lefrak entities"), owned and controlled by members of the Lefrak family. Each Lefrak entity owns property and purchases and pays for heating oil for its own use (63a-95a).

17. Lefrak Organization, Inc. is a corporation whose name is used to represent the Lefrak interests to the public (Rec. No. 48 in 74-C-979).

position that Lefrak I should be dismissed without prejudice and Lefrak II should proceed (Rec. No. 80, Transcript at p. 4 in 74-C-979). The parties then considered what to do about related issues in the event the Court acceded to the parties' joint request concerning dismissal without prejudice of Lefrak I. Discussion ensued concerning such related issues as transferring the discovery which had occurred in Lefrak I to Lefrak II, scheduling of discovery, confidentiality agreements and the problem of the still pending, but undecided intervention motions in Lefrak I (Rec. No. 80 in 74-C-979, 57a-62a).

These pending intervention petitions posed a similar problem for plaintiffs as had the designation of Lefrak Organization, Inc. as plaintiff in Lefrak I. The problem was that like Lefrak Organization, Inc., the named intervenor plaintiffs, Glenwood Management Corporation, Hillside Associates, Pickman Brokerage Agency and Forrest Hills South, Inc., arguably were not proper plaintiffs because they managed, but did not themselves own property or use and pay for heating oil.[18] In the event Lefrak I was dismissed without prejudice and Lefrak II proceeded, the options open to plaintiffs with respect to the pending interventions were either to file new separate lawsuits on behalf of each owning company or to file new intervention petitions in Lefrak II, this time naming the owning companies and not the managing companies as intervenors. Either option would greatly increase the number of named plaintiffs or intervenors.

With respect to these pending motions to intervene Wolfe stated:

> In the first Lefrak action we had outstanding approximately six or seven motions to intervene. We are going *to have to have* a substantial number of additional plaintiffs, some of whom fall into the same commercial

18. The principals who owned or controlled the management companies who were the original intervenors are the same principals who own or control the owning companies managed by those original intervenors.

> relationship as Lefrak, others who may be cooperatives and the like.
>
> You deferred consideration of the motion to intervene previously. We can do it by every one filing a separate lawsuit . . . [Emphasis added] (60a)

It is important to focus on this statement because defendants have attributed a totally erroneous meaning to it and much of their theory of the conspiracy rests on their distorted construction of this paragraph. In stating, "We are going *to have to have*[19] a substantial number of additional plaintiffs", Wolfe plainly was referring to the fact that if Lefrak I was dismissed without prejudice because the intervenors were arguably misnamed as was the original plaintiff in Lefrak I, the motions of the intervenor plaintiffs either would have to be refiled as intervention motions in Lefrak II, using the names of their owning companies, or the intervenors would have to become original plaintiffs in new lawsuits.

Defendants not only have cited this portion of the record out of context by relating Wolfe's statement to the mailing of the totally unrelated Sulzberger and Elliman letters, but they misquote the portion they do quote, omitting the words "*to have*" in line three of the passage (Def. Br. p. 4). Defendants' misquotation of Wolfe's statement as "we are going *to have* a substantial number of additional plaintiffs . . ." (emphasis added) completely changes the meaning of Wolfe's statement and creates the impression that additional and wholly new plaintiffs would have to be procured for Lefrak II. Defendants would have this Court believe that in effect Wolfe stated his intention to solicit clients in an open conference with opposing counsel and Judge Costantino present. The Judge did not interpret that Wolfe's statement "forecast" [App. Br., p. 33] the conduct of the Berger firm alleged by Exxon, but saw the statement as properly resulting out of the procedural context of Lefrak I (222a). The Judge completely under-

19. Meaning: "it will become necessary to have".

stood the context of Wolfe's statement, "we are going *to have to have* a substantial number of additional plaintiffs," (emphasis added) because as a result of the conference an Order was signed providing that the motion to amend Lefrak I be withdrawn, the Lefrak I action be dismissed without prejudice and the motions to intervene filed in Lefrak I be dismissed without prejudice (56a).

D. The Proceedings Below on Defendants' Motion to Disqualify.

On Friday afternoon, February 21, 1975, Wolfe received a telephone call from Robert Osgood ("Osgood"), counsel for Exxon, informing him that Exxon had obtained from Judge Costantino an *ex parte* restraining Order against the Berger firm (126a). This being the first notice the Berger firm had of these proceedings, Wolfe telephoned the court, to learn the subject matter of the Order (126a). Wolfe learned that the Order stated that pending hearing and determination of the motion to disqualify the Berger firm from representing plaintiffs Samuel J. Lefrak, et al., New York City Housing Authority and Rochdale Village, Inc., there could be no communication by the Berger firm with any potential plaintiffs (105a, 126a). After having been so informed, Wolfe sought to have the Order vacated because of lack of notice and the Berger firm's inability to be heard in opposition to the Order (126a).[20] The court then vacated the Order (126a). Late that same Friday afternoon, Wolfe received a telephone call from the court informing him that the court had again entered an Order in a modified form (105a) as a result of another *ex parte* visit of Messrs. MacCrate and Osgood, both counsel for Exxon (127a).[21]

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20. Plaintiffs' counsel attempted to dissolve this Order the following Monday on the grounds that it violated Federal Rule of Civil Procedure 65 for its failure to show immediate and irreparable harm, to give notice or to certify to the court why notice should not be required and to post security (122a-130a, 131a-135a).

21. Appellant Exxon contends that the information contained in the application for the motion to disqualify and enjoin was brought to the attention of plaintiffs' counsel "as soon as possible" (Def. Br.

In its moving papers (103a-121a), Exxon, later to be joined by Aramco, Gulf and Texaco, charged plaintiffs' counsel with solicitation of plaintiffs "on a wholesale basis" based on the discovery of the aforementioned letters of the Sulzberger and Elliman companies (113a-115a, 120a-121a).

Plaintiffs' counsel immediately investigated and ascertained all the facts relevant to the allegations contained in Exxon's moving papers. Prior to the first hearing on March 3, 1975, in order to make full disclosure of the results of its investigation, plaintiffs' counsel filed seven affidavits. The affidavits were those of Sulzberger, president of the Sulzberger company, Buchbinder, secretary of the Sulzberger company who was directed by the company's president to send the Sulzberger letter to their principals, Hamlin, president of the Elliman company, Gumley, vice president of the Elliman company who was directed by the company president to send the Elliman letter to their principals, Lippman of the Wien firm and Berger and Wolfe of the Berger firm (155a-193a). These affidavits included all the individuals of whom Exxon sought depositions in their initial moving papers (109a, 110a).

At the March 3 hearing, counsel for Exxon requested additional depositions (225a-226a). Not rejecting the possibility of taking depositions, Judge Costantino invited MacCrate to present any questions he wished to have asked

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21. (Cont'd.)

p. 9). This is patently inaccurate. First, the documents relied upon in the moving papers had been obtained well in advance of the February 21, 1975 application. Newman, counsel for Aramco, learned of one of the alleged soliciting letters on February 14 (117a). Osgood, counsel for Exxon, learned of the other on February 14 (117a). Newman saw Wolfe, counsel for plaintiffs, at a hearing involving the instant actions on February 20 (125a). Defense counsel never mentioned these letters to Wolfe who learned of the problem on February 21 only after the first Order was entered (125a-126a). The second or "interim Order" was entered only after a second *ex parte* conference without notice, so that plaintiffs' counsel, who was two hours away, could not attend (127a).

at the evidentiary hearing to take place on March 5 and stated, "I will determine which of those people should be deposed, if any, and I will reserve decision on the entire issue at this time" (241a). The court had already received affidavits, which were filed prior to the March 3 hearing, of all parties of whom discovery had been requested by defendants except for the few parties named by defendants in an affidavit filed immediately prior to the March 3 hearing.[22]

Counsel for plaintiffs offered its witnesses for live testimony at the March 3 hearing (232a, 234a, 241a). The court adjourned that hearing at defendants' request and set March 5 for a hearing on Exxon's contentions directing the four attorneys Berger, Wolfe, Lippman, and Felsten, to be present to testify on March 5, 1975 (229a-230a, 241a-242a).

At the March 5 hearing before the examination of the witnesses Lippman, Berger, Wolfe and Felsten, the Court received written questions submitted by MacCrate (319a-336a). These questions were not only extraordinarily extensive,[23] but went into such areas as plaintiffs' counsels' litigation strategy and mental impressions about the case (e.g. 320a, 335a), conversations between attorney and client (e.g. 334a, 335a) and conversations between associate counsel with respect to division of fees (331a, 334a). After

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22. Counsel for Exxon requested depositions of Frank Doelger of Brown Harris, Frank Karelson and someone from the Ashforth Company (226a).

Immediately before the March 3 hearing, Exxon filed an additional affidavit which allegedly supported their accusations (249a-252a). This affidavit described three letters, the letter sent from Lippman to Brown Harris (252a), the letter addressed to Frank Karelson, Sr., Esq. closely resembling the Elliman letter (250a-251a) and a letter from Frank E. Karelson, III to the Ashforth company (250a). Of the three individuals not directly examined and from whom no affidavits were obtained, the facts involving them were fully explored in relation to the charges of defendants (Doelger, 252a-253a, 278a-299a; Frank Karelson and the Ashforth company, 250a-251a, 281a).

23. One hundred eight questions were prepared for Lippman alone (319a-328a).

carefully examining those questions, the court in its discretion denied MacCrate's request to interrogate witnesses or to use MacCrate's questions verbatim, but invited MacCrate to suggest questions and avenues of inquiry for the court to explore (265a).[24] The Judge, in fact, did propound questions in every area that MacCrate requested (276a-281a, 294a-296a, 302a-303a) except in those few areas he found to be irrelevant (282a-283a, 297a). In this manner, the court extensively examined the four attorneys, Lippman, Berger, Wolfe and Felsten.[25]

The court in its opinion of March 11, 1975 (357a-367a) thoroughly dealt with each charge made and inference raised by defendants and filed an opinion containing exhaustive findings of fact (359a-363a). Judge Costantino concluded that no further testimony by deposition or otherwise was necessary, that neither the Berger nor Wien firms were in violation of any of the ethical precepts raised by defendants and that their conduct had been entirely proper (358a-363a).

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24. Defendants state in their Brief at p. 17 that at the March 3, 1975 hearing, the Judge instructed counsel for Exxon "to prepare the questions he wished to ask the witnesses", citing page 242 of the Joint Appendix. Nothing of this nature appears on that page of the Joint Appendix, nor did the Judge ever tell counsel for Exxon that he could pose the questions. The Judge did say to counsel for Exxon, "I suggest you bring in your presentation" (248a).

25. All documents offered as evidence by defendants at the March 5 hearing (266a, 305a-318a) with the exception of defendants' Exhibits G and H had already been filed of record by plaintiffs' counsel, in their proper context, as exhibits to sworn affidavits. Exhibit G, the unsigned letter addressed to Frank Karelson, Sr., Esq. (317a), and Exhibit H, the letter from Frank E. Karelson, III to the Ashforth Company (318a), raised matters not mentioned in the original moving papers (103a-121a). The district court explored the areas covered by Exhibits G and H through oral testimony on March 5 (250a-251a, 281a).

ARGUMENT.

The Procedure Employed by the Court Below Was a Proper Exercise of Its Discretion and Entirely Reasonable. No Basis Exists Therefore for Remand.

The sole ground for this appeal is appellants' contention that the court below committed reversible error by declining to order the requested discovery on its disqualification motion and failing to allow Exxon's counsel, rather than the court itself, to conduct the examination of witnesses. The court chose to deny appellants' motion on the basis of numerous affidavits presented by the parties and two hearings, the second of which consisted of the presentation of extensive oral testimony by the attorneys allegedly involved.

The only relief requested in appellants' brief (App. Br. p. 4) is the vacation of the lower court's Order denying disqualification and the remand of the matter for an "investigation" of the underlying facts. By not asking for a reversal and disqualification of the Berger firm, appellants admit that the record of the proceedings below does not contain a basis for concluding that any of plaintiffs' counsel have engaged in solicitation.

Accordingly, the sole issue is whether the District Court should be ordered to expend additional judicial resources to continue what has proven to be a fruitless inquiry instigated by Exxon--an inquiry that is totally unrelated to the merits of this complex and important case.[26] Appellee submits that the affidavits, the transcripts of the hearings and the extensive factual findings, all summarized in the exhaustive counter-statement of the case, *supra,* warrant the summary affirmance of the decision below.

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26. This tangential matter already has substantially delayed the resolution of this action by causing plaintiffs' counsel to divert their energies toward defeating appellants' motion.

A. The District Court's Determination of a Motion to Disqualify Should Be Given Extremely Limited Review on Appeal.

This Circuit has repeatedly concluded that the decision of a district court on a disqualification motion will be disturbed only when an abuse of discretion is shown to have taken place. *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, Doc. No. 74-1104 (2d Cir. May 23, 1975) (Slip Op. 3669); *Hull v. Celanese Corp.*, 513 F. 2d 568 (2d Cir. 1975). As was stated by this court in *Hull:*

> The district court bears the responsibility for the supervision of the members of its bar. * * * * The dispatch of this duty is discretionary in nature and the finding of the district court will be upset only upon a showing that an abuse of discretion has taken place. 513 F. 2d at 571.

When, as here, the district court's findings are supported by the record, the Court of Appeals should not disturb them even when the evidence is conflicting. *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., supra.*[27] Appellants also recognize the narrow scope of review accorded these matters (App. Br. 25).

Thus, the role of an appellate tribunal is "a limited one", *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., supra* at 3683 (Adams, J., concurring), restricted to determining whether the district judge's findings are clearly in error and whether the relevant legal tests have been correctly formulated and applied.[28]

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27. Other federal courts have applied the same restrictive standard for the scope of review. See, e.g., *Richardson v. Hamilton International Corp.*, 469 F. 2d 1382, 1386 (3d Cir. 1972), *cert. denied,* 411 U. S. 986 (1973); *Greene v. Singer,* 461 F. 2d 242 (3d Cir. 1972), *cert. denied,* 409 U. S. 848 (1972); *Waters v. Western Co. of North America,* 436 F. 2d 1072 (10th Cir. 1971) (trial judge's discretion "will not be disturbed on appeal except in the most extreme of cases").

28. The instant case is a perfect example of the propriety of this role. The district judge has seen and heard both charging and de-

B. A Motion to Disqualify Counsel Is Addressed to the Court's Supervisory Power and Calls for a Judicial Inquiry, Not an Adversary Proceeding.

Since appellants claim that the court below abused its discretion only with regard to some of the procedures it followed, it is important to understand the nature of disqualification proceedings. An investigation into charges of misconduct against an attorney is a judicial inquiry; it does not involve the adversary process.[29] As this court stated in *Erdmann v. Stevens,* 458 F. 2d 1205, 1209 (2d Cir. 1972):

> The power to discipline, like the power to admit an applicant to membership of the bar, rests exclusively with the court. Accordingly, a district court's conduct of disciplinary proceedings with respect to those admitted to practice before it amounts to a judicial inquiry. *Id.* at 1208.[30]

In short, the matter is entirely in the hands of the district judge. That it was a lawyer for a party to the action who charges misconduct on the part of opposing counsel does not diminish the trial judge's power and responsibility to control the inquiry. Precisely the contrary is true.

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28. (Cont'd.)
fending counsel has held an evidentiary hearing and has observed the witnesses in support of and in opposition to the allegations. Moreover, the alleged misconduct arises out of a major lawsuit which has been assigned to a district judge for all purposes. He has a special expertise regarding the litigation and the conduct of the lawyers involved that typically will not be available to the Court of Appeals.

29. A "judicial inquiry" has been defined by the Supreme Court as one in which the court "investigates, declares, and enforces the liabilities * * * ." *Prentis v. Atlantic Coast Line Co.,* 211 U. S. 210, 226 (1908).

30. The Third Circuit also has concluded that "it is the duty of the district court to examine the [disqualification] charge, since it is that court which is authorized to supervise the conduct of the members of its bar." *Richardson v. Hamilton International Corp., supra* at 1385. See also *Theard v. United States,* 354 U. S. 278, 281 (1957); *Sanderson v. Winner,* 507 F. 2d 477 (10th Cir. 1974).

Given the personal interest or motive for the accusation of the precipitating party and its attorney, the court must double its efforts to make certain that the proceeding is kept within proper bounds and is conducted with only the integrity of the system in mind. The accusing attorney has no special status regarding the management of the proceeding, nor does he acquire any right to prescribe the procedures that should be followed or to dictate the scope of the inquiry.[31] The party or attorney alleging misconduct discharges his or her professional responsibility by bringing the matter to the court's attention. He or she must then allow the court to proceed with the inquiry and accept whatever role, if any, the court may assign. Appellee's research has not revealed any federal court decision that has deviated from these principles and the appellants have cited nothing in their brief that suggests they have standing to insist that the court proceed in a certain fashion.

There is no prescribed procedure to be followed on a judicial inquiry into a charge of misconduct. An informal procedure tailored to the circumstances is entirely satisfactory. *In re Claiborne*, 119 F. 2d 647 (1st Cir. 1941). Moreover, the Federal Rules of Civil Procedure do not apply, as the defendants impliedly admitted when they moved for an order to show cause and failed to comply with the requirements of Federal Rule 65(b) for a restraining order.[32] Therefore, it is the prerogative of the district judge to use whatever procedure he deems appro-

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31. Of course, basic principles of fairness, if not due process, necessitate that the lawyer whose disqualification is sought be given notice and an opportunity to be heard on the charges. *Korn v. Franchard Corp.*, 456 F. 2d 1206 (2d Cir. 1972). The judicial inquiry held here clearly satisfied this requirement.

32. Mr. MacCrate himself recognized the inapplicability of the Federal Rules in an affidavit answering the papers filed by David Berger, P. A. in opposition to the motion below. After noting the "unusual nature of the proceeding," he stated:

> This is not a proceeding by a party for preliminary private relief such as is normally regulated by F. R. C. P. 65. It is rather a proceeding to protect the judicial process itself. (148a)

His position on appeal is directly contradicted by his affidavit.

priate to the particular case when inquiring into the charge.

The cases demonstrate that various procedural techniques have been employed by federal district judges to adjudicate motions to disqualify: (a) by deciding the matter on affidavits and oral argument by counsel, *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., supra; General Motors Corp. v. City of New York,* 501 F. 2d 639 (2d Cir. 1974); *E. F. Hutton & Co. v. Brown,* 305 F. Supp. 371 (S. D. Tex. 1969) (affidavits and transcripts); *United States v. Standard Oil Co.,* 136 F. Supp. 350 (S. D. N. Y. 1955); (b) by a combination of depositions and affidavits presented to the court, *Emle Industries, Inc. v. Patentex, Inc.,* 478 F. 2d 562 (2d Cir. 1973); *Richardson v. Hamilton International Corp., supra; Magida v. Continental Can Co.,* 231 F. 2d 843 (2d Cir. 1956); (c) by the court appointing a special master, *Consolidated Theatres, Inc. v. Warner Bros. Circuit Management Corp.,* 216 F. 2d 920 (2d Cir. 1954); *In re Realty Associates Securities Corp.,* 61 F. Supp. 574 (E. D. N. Y. 1954); (d) stipulation, requested by counsel, as to the facts, *Porter v. Huber,* 68 F. Supp. 132 (W. D. Wash. 1946); (e) and as in this case, by the district judge holding an evidentiary hearing. *Universal Athletic Sales Co. v. American Gym, Recreational & Athletic Equipment Corp.,* 357 F. Supp. 905 (W. D. Pa. 1973); *Lasky Bros. of West Virginia, Inc. v. Warner Bros. Pictures, Inc.,* 130 F. Supp. 514 (S. D. N. Y. 1955), affirmed, 224 F. 2d 824 (2d Cir. 1955), *cert. denied,* 350 U. S. 932 (1956).[33]

Because of the judicial nature of the proceedings and the need for discretion in the hands of the trial judge, it is logical that no Court of Appeals has reversed—or even questioned—the district court's choice of procedure on a disqualification motion. Appellants are in error when they suggest (App. Br. p. 41) that they were entitled to the full

33. In cases involving confidential communications several courts have been unwilling to hold hearings because of a fear of violating the confidences of a former client, e.g., *Emle Industries, Inc. v. Patentex, Inc., supra.*

panoply of discovery available in adversary proceedings under the Federal Rules of Civil Procedure. Compare *Matter of Teitelbaum,* 253 F. 2d 1 (7th Cir. 1958) (charging counsel has no standing to seek appeal of denial of disbarment). A judicial inquiry into charges of misconduct is not an adversarial proceeding. Accordingly, the discovery rules are inapplicable at this juncture.[34] Similarly, appellants are guilty of verbal legerdemain when they suggest that simply because they find no decision holding that the use of discovery is an "impermissible" technique on a disqualification motion that Judge Constantino committed reversible abuse of discretion by failing to grant MacCrate's request for extensive and unnecessary discovery either before or after holding the evidentiary hearing on March 5, 1975. The fact is that there are no precedents even suggesting that discovery is obligatory, let alone that the failure to order it is reversible error.

C. The Procedure Used Below Was Entirely Appropriate, Amounted to a "Full and Vigorous Investigation," and Provided the District Judge With a Complete Evidentiary Basis for Denying the Motion for Disqualification.

The appellants are trying to convince this court that Judge Costantino's rejection of MacCrate's demand for elaborate discovery on Exxon's charges amounted to an abuse of discretion. Yet, their brief offers little more than a series of innuendoes and conclusory suppositions to the effect that solicitation has occurred, apparently as a result of an alleged nefarious, secret understanding between the Berger and the Wien firms.

The plain fact is that Judge Costantino did conduct a "full and vigorous investigation" (App. Br. p. 4) into

34. In *Stavrides v. Mellon National Bank & Trust Co.,* 60 F. R. D. 634 (W. D. Pa. 1973), discovery into counsel's conduct was judicially authorized but only for purposes of determining whether to certify a class. Even in this context, the court limited the scope of inquiry by specifying the types of questions that could be asked.

the matter, and as set out in his detailed finding of fact (359a-363a), he found no evidence to support appellants' charges. Accordingly, Judge Costantino found no basis for allowing free wheeling discovery by appellants.[35]

A review of the progression of events demonstrates the propriety of Judge Costantino's handling of the inquiry. The district judge concluded that the Sulzberger letter to which the Berger blank fee letter was annexed, as well as the Elliman letter, justified initiating a judicial inquiry into Exxon's solicitation charge. Judge Costantino initiated that judicial inquiry by scheduling the first hearing for March 3, 1975.

At this hearing, however, Exxon's self-described "prima facie" case began to evaporate. Judge Costantino had before him not only Exxon's charging papers, which included several affidavits and a memorandum suggesting how suspicious the Sulzberger and Elliman letters were, but he also had an opposing memorandum from the Berger firm and affidavits from Wolfe, Berger, Lippman, Sulzberger, Buchbinder, Hamlin, and Gumley. Collectively these affidavits stated that no one in the Berger firm had either participated in or encouraged—directly or indirectly—the issuance of the Sulzberger and Elliman letters. These papers provided the district court with a complete and persuasive explanation as to the sources of those letters and indicated that the relationship between the Berger and Wien firms was entirely professional and had not in any way led to the issuance of the challenged letters.

Given this record, it was entirely proper—indeed, it was obligatory—for Judge Costantino to reject Exxon's contention that a "prima facie" case of solicitation still existed. He quite accurately said of the Exxon charges, "all it is is suspicion" (224a). He also correctly expressed concern that granting MacCrate's request for numerous

35. Additional factors also compel this conclusion. First, the disqualification proceeding is totally unrelated to the merits of the action. Second, the alleged solicitation in no way relates to the actual plaintiffs represented by the Berger firm in current litigation.

depositions and other forms of discovery would have a deflecting effect on the main action (226a). Furthermore, Judge Costantino properly exercised his discretion when he indicated at the March 3 hearing that given the state of the record there "shouldn't be an inquisition" or "a searching expedition" and that all that was necessary was a series of "straightforward direct" questions on the charges (230a). To insure more detailed exploration of the matter, Judge Costantino decided to hold an oral, evidentiary hearing two days later to examine the principals to the dispute.

Finally, with regard to the March 3 hearing, it should be emphasized that Judge Costantino did consider the option of taking depositions. He invited MacCrate to present any questions he wished to have asked at the evidentiary hearing and said, "I will determine which of those people should be deposed, if any, and I will reserve decision on the entire issue at this time" (241a). In effect, therefore, on March 3, Judge Costantino ordered that a hearing be held on March 5 to determine if any further steps should be taken.

Appellants' claims thus are reduced to a contention that it is an abuse of discretion in the context of a judicial inquiry for a district judge to hold an evidentiary hearing to provide him with a basis for determining the need for further proceedings, rather than simply allowing adverse counsel to proceed with a series of depositions. What Judge Costantino did on March 3 seems very analogous to the well established and sensible pretrial conferencing practice under Federal Rule 16 and the more extensive proceedings called for by the Manual on Complex Litigation.

The March 5 evidentiary hearing clearly led to a full disclosure of the facts. The court conducted a full and complete judicial inquiry into appellants' charges, examining Lippman, Berger, Wolfe, and Felsten, and permitting MacCrate to pose supplemental questions to them through the court. Although Judge Costantino did not allow MacCrate to question the witnesses directly and did not

propound each of the interrogatories on the lengthy lists of questions MacCrate had previously prepared,[36] an examination of the transcript of the March 5th hearing leaves no doubt as to the completeness of Judge Costantino's examination or his willingness to accept MacCrate's suggestions as to additional lines of inquiry. Indeed, there were only two occasions on which MacCrate requested a question that was not propounded by the court (282a, 297a). In both instances the questions were quite properly rejected since they would have dealt with matters covered by the attorney-client privilege (297a) or subjects that were wholly extraneous to the inquiry (282a).

As the record indisputably reflects, on March 5th, Judge Costantino fully explored (1) the relationship between the Wien firm and the Berger firm; (2) the relationship between the Wien firm and the Sulzberger and Elliman companies and Brown-Harris; (3) the circumstances of the letters from the Wien firm to their clients; and (4) the non-existence of any relationship between the Berger firm and the Wien clients. Each of the lawyers testified that there had never been any conversation "between members of the two firms concerning the solicitation of clients on the outside" (272a); that no one in either firm knew about, authorized, or had anything to do with the letters from the Wien clients to the cooperative owners (275a, 280a, 284a, 293a, 298a-99a); that the blank fee letter attached to the Sulzberger letter had been sent to Sulzberger, at his request, almost seven months earlier in connection with a single telephone conversation between Sulzberger and Wolfe wherein Sulzberger asked Wolfe for information, that no other blank fee letter has ever been sent out (289a-294a, 295a-296a); that the Berger firm has never authorized anyone to distribute its fee schedule (285a) and that neither the Berger nor the Wien firms have ever authorized anyone to talk to anyone else about becoming clients of these firms in this litigation (283a, 291a-292a,

36. The court did take a recess before the witnesses testified to examine MacCrate's questions (268a).

294a). Finally, each witness categorically denied any solicitation of clients in connection with the pending litigation (Lippman, 275a; Berger, 283a-284a; Wolfe, 291a-293a, 295a-296a; and Felsten, 298a-300a).

Shortly after the close of the hearing on March 5th, Judge Costantino issued an opinion including the following findings of fact: (1) all "communications by members of the Wien and Berger firms to potential plaintiffs appear to have been made in compliance with instructions given by clients or others"; (2) there had been no showing that any member of either firm improperly gave advice or influenced another; (3) there was no evidence that any member of the Berger or Wien firms had requested a person or organization to recommend their employment; (4) no unsolicited advice had been given; and (5) no evidence of improper solicitation in violation of New York law had been presented. These findings are fully supported by the record as it existed following the March 5th hearing. Indeed, the conclusion seems both simple and inescapable—the letters of the Wien clients were sent without the instigation, involvement, authority, or knowledge of the Berger firm and the attachment of the blank fee letter to the Sulzberger letter was a fortuitous happenstance that was totally beyond the Berger firm's ability to prevent. Therefore, Judge Costantino properly concluded that no useful purpose would be served by extending the hearings or conducting additional discovery.

Further inquiry into this matter would be futile, wasteful, and counter-productive. The testimony at the March 5th hearing responded to the bulk of the legitimate substantive questions on the four lists submitted to the court by MacCrate (319a-336a). The only items contained in the written questions and omitted by Judge Costantino were (1) a number of purely background questions, often relating to the witness' professional experience;[37] (2) several ques-

37. For example, Lippman would have been asked such things as: "Do you customarily engage in litigation matters yourself?" and "Have you had any professional experience in antitrust matters?" (319a).

tions concerning details of various events that become inappropriate lines of inquiry once the witness testified that he had no knowledge of the event or it became clear that the questions were based on an erroneous assumption;[38] (3) various questions concerning events that occurred after the alleged solicitation had taken place and the reaction of the witnesses and others thereto;[39] (4) inquiries into the litigation strategy of plaintiffs' counsel or their mental impressions about various aspects of the case;[40] (5) questions as to conversations between one of the attorneys and a client that transgress the attorney-client privilege; and (6) an inordinate number of questions concerning various fee arrangements, some of which had absolutely nothing to do with the charges before the court.[41] Given the nature of these questions, their omission was appropriate.

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38. Numerous questions would have been asked of Felsten on the assumption that his reference to responses in the February 11, 1975, letter to David Berger applied only to the Sulzberger letter (330a-331a). As Felsten testified and as has been made clear in the Counter-Statement of the Case, the reference was to people who already were clients of the Wien firm, specifically Harry B. Helmsley and his various interests (302a-303a).

39. Illustrative is the following proposed question to Mr. Lippman: "Did you protest to anyone in your own office the content of the communication." Appellants' Brief (p. 18) complains about the court's failure to inquire into events following the sending of the letters but it is difficult to see how this has any bearing on whether the solicitation ever took place.

40. The following are typical: Of Berger, "When did you make the decision to suggest the alternative separate lawsuit?" (335a); of Lippman, "When you wrote 'We believe that the oil companies will probably prefer to settle the case eventually rather than litigate the issues'; whose belief were you expressing?" (320a). A number of the questions would be impermissible under Federal Rule 26(b)(3) even if this were a plenary civil action. See 8 Wright & Miller, Federal Practice and Procedure § 2026 (1970).

41. Of Lippman: "Did he [Sulzberger] indicate why he wanted the letter?" (321a). Of Berger: "What arrangements do you have with Richard Lefrak for the sharing of attorneys' fees with respect to any of these matters?" (334a); "Are you, in fact, prepared to accept retainers on the terms set out in that blank form of retainer agreement?" (334a); "Have you a retainer agreement from Harry Helmsley?" (335a). Of Felsten: "What determines whether your firm will share in the fee on a recovery by a particular plaintiff?" (331a). The Tenth Circuit has suggested that fee arrangements are an inappropriate subject of discovery. *Sanderson v. Winner, supra.*

It also is apparent that MacCrate's lists of questions would have been extremely harassing, would have invaded sensitive areas, such as the attorney-client relationship, and would have nothing to do with the merits of the pending litigation. Even if this were a plenary civil action, rather than a limited judicial inquiry, discovery into the various sensitive matters that would be intruded upon by MacCrate's questions would have to be kept extremely narrow and the district court would have the duty to restrict the scope of examination. *Sanderson v. Winner,* 507 F. 2d 477 (10th Cir. 1974); *Sayre v. Abraham Lincoln Federal Savings & Loan Association,* 65 F. R. D. 379 (E. D. Pa. 1974); *Stavrides v. Mellon National Bank & Trust Co.,* 60 F. R. D. 634 (W. D. Pa. 1973); *Bogosian v. Gulf Oil Corp.,* 337 F. Supp. 1228 (E. D. Pa. 1971). Federal Rule of Civil Procedure 26(c) gives a district judge extensive authority in a civil action to limit discovery or to direct that it not be undertaken when it seems unnecessary or sought for an ulterior purpose. See 8 Wright & Miller, Federal Practice and Procedure: Civil § 2036 (1970). The court's obligation to protect against unwarranted discovery is even greater in a nonadversarial judicial inquiry.

Finally, nothing in the appellants' brief rises above pure speculation concerning the origin of the letters and the relationship between the two law firms. By selectively piecing together verbal and factual fragments taken out of context and making mysterious that which is obvious and has been explained, the appellants' brief attempts to manufacture a great deal of smoke. Its suggestion, however, that a further delay in the adjudication of the case may produce fire must be rejected.

Among the more egregious examples of these tactics is appellants' extensive "critique" of the Sulzberger and Elliman letters, which, despite their purely informational character, appellants describe as an "enticement to potential clients" (App. Br. pp. 33-35). Moreover, despite the clearest possible statements by the witnesses at the March 5th hearing (i) that the Wien and Berger firms had no

knowledge of the Sulzberger or Elliman companies' intention to write letters to their clients, (ii) that the law firms in no way authorized or participated in their issuance, and (iii) that Berger had no association with the Sulzberger or Elliman companies except the one conversation between Wolfe and Sulzberger months earlier, the appellants cavalierly state that "an apparent solicitation of clients had occurred with the Berger and Wien firms as the intended beneficiaries" and "that widespread efforts to stir up litigation against the defendants were underway" (App. Br. p. 35). Similarly, appellants seemingly feigned curiosity over the fact that the Sulzberger and Elliman letters bear a striking resemblance to the letters written to them at their request by their attorney of many years (App. Br. p. 21), and their innuendos concerning Wolfe's remark about "additional plaintiffs" (App. Br. pp. 33, 40), which has been fully explained earlier in appellee's Counter-Statement of the Case, are nothing more than desperate attempts to create an aura of ambiguity. There are no ambiguities in this matter and there is no basis for this court to conclude that Judge Costantino abused his discretion. The facts relevant to Exxon's allegations were fully revealed by the evidentiary hearing.

The Court Below Correctly Rejected Appellants' Charge of Solicitation After a Full Evidentiary Hearing, Leaving No Reason for a Further Investigation.

The facts established by the affidavits and oral testimony presented to Judge Costantino show that no one—neither the Berger and Wien firms, the Sulzberger and Elliman companies, Brown Harris nor Karelson—has violated either the letter or the spirit of the American Bar Association Code of Professional Responsibility, which has been adopted as the Code of Professional Ethics by the New York State Bar, or Section 479 of the New York Judiciary Law,[42] which relates to the solicitation of legal

42. New York Judiciary Law § 479 provides:

It shall be unlawful for any person or his agent, employee or any person acting on his behalf, to solicit or procure through

business. It should be set forth at the outset that the New York Court of Appeals has unequivocably stated the following principal: "The acceptance of numbers of cases referred by acquaintances is not, without more, professional misconduct * * *." *Kelly v. Greason,* 23 N. Y. 2d 368, 380, 296 N. Y. S. 2d 937, 947 (1968). Not even this has occurred in this case.

A. Wien, Lane, and Malkin Have Not Engaged in Any Improper Conduct.

The Sulzberger and Elliman companies and Brown Harris are regular and long-standing clients of the Wien firm.[43] Accordingly, the communications between Wien and these real estate management companies concerning the heating oil litigation were part of their ongoing attorney-client relationship. This fact—by itself—is sufficient to dispel any possible inference that Wien has violated Section 479 of the New York Judiciary Law. According to a leading New York decision:

> No canon and no penal statute condemns the recommendation of lawyers to persons in a personal, social or professional relationship, preexisting the making of the recommendation and reasonably concerning matters referrable to the relationship.

People v. Schneider, 20 A. D. 2d 408, 411, 247 N. Y. S. 2d 623, 626 (1st Dep't 1964). To the same effect is *Kelly v. Greason, supra.* See also *Ashe v. State Bar,* 71 Cal. 2d 123, 77 Cal. Rptr. 233, 453 P. 2d 737 (1969). The same con-

42. (Cont'd.)
solicitation either directly or indirectly business, or to solicit or procure through solicitation a retainer, written or oral, or any agreement authorizing an attorney to perform or render legal services, or to make it a business to so solicit or procure such business, retainers or agreement.

43. Lippman categorically denied at the March 5th hearing that he had communicated with his personal friend, Karelson, about the heating oil litigation (281a). Misconduct by the Wien firm in that connection, therefore, is impossible.

clusion must be reached under the Canons of Ethics and the Disciplinary Rules of the American Bar Association. In substance, these rules prohibit a lawyer from recommending, on an unsolicited basis, himself or an associate to a non-lawyer or from voluntarily advising or suggesting that a non-lawyer should take legal action.

The affidavits of Lippman, Sulzberger, and Hamlin, as well as the oral testimony of Lippman and Felsten at the March 5th hearing, establish that the Sulzberger and Elliman companies and Brown Harris, all of whom knew of the litigation before communicating with Lippman, requested information from the Wien firm as to its status, and that the Wien firm did nothing more than discharge its obligations to its clients by providing the requested information in a letter to each of them (166a-169a; 277a-281a). When the Sulzberger and Elliman companies subsequently incorporated the substance of the Lippman letters into their own letters to their own principals, they did so without the authority or knowledge of anyone in the Wien firm (164a-165a, 298a-300a). The record is absolutely barren of any evidence even remotely suggesting that there was an understanding, express or implied, between Wien and its clients that the latter would write to their principals concerning the heating oil litigation. Under these circumstances there is absolutely no basis for suggesting that the Wien firm has violated any part of either DR 2-103[44] (recommenda-

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44. DR 2-103 Recommendation of Professional Employment.

(A) A lawyer shall not recommend employment as a private practitioner, of himself, his partner, or associate to a non-lawyer who has not sought his advice regarding employment of a lawyer.

(B) Except as permitted under DR 2-103(C), a lawyer shall not compensate or give anything of value to a person or organization to recommend or secure his employment by a client, or as a reward for having made a recommendation resulting in his employment by a client.

(C) A lawyer shall not request a person or organization to recommend employment, as a private practitioner, of himself,

tion of professional employment) or DR 2-104 [45] (suggestion of need of legal services).

With respect to DR 2-103: First, it was a non-lawyer who sought advice; hence, the Wien firm was entitled to recommend any attorney, even itself, if it felt so inclined and if it thought it was in the best interests of its clients. Second, the letters, in fact, did not recommend the employment of any person within the Wien firm. Third, in actuality, the unqualified and unshaken testimony of two members of the Wien firm is that they did not recommend anyone. This is supported by the letters to Sulzberger, Hamlin of the Elliman company, and Brown Harris, which simply identify Berger and give a short description of that firm's practice.

With respect to DR 2-104: First, since the advice of the Wien firm was solicited by their clients, DR 2-104 is wholly inapplicable. Second, even if Wien had volunteered advice or information about the heating oil litigation, it was dealing with a regular and long-standing client to whom the giving of unsolicited advice is expressly per-

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44. (Cont'd.)

his partner, or associate, except that he may request referrals from a lawyer referral service operated, sponsored, or approved by a bar association representative of the general bar of the geographical area in which the association exists and may pay its fees incident thereto.

(D) A lawyer shall not knowingly assist a person or organization that recommends, furnishes, or pays for legal services to promote the use of his services or those of his partners or associates.

45. DR 2-104 Suggestion of Need of Legal Services

A. A lawyer who has given unsolicited advice to a layman that he should obtain counsel or take a legal action shall not accept employment resulting from that advice, except that:

1. A lawyer may accept employment by a close friend, relative, former client (if the advice is germane to the former employment), or one whom the lawyer reasonably believes to be a client.

mitted by DR 2-104(1). As EC 2-3[46] and EC 2-4[47] make abundantly clear, the Wien firm was perfectly free to volunteer advice and even accept employment or other benefits since the advice was given to a regular client.[48]

B. The Sulzberger and Elliman Companies Have Not Engaged In Any Improper Conduct.

Both the Sulzberger and Elliman companies function as agents to a number of client-principals who are cooperative owners of real estate. As such, they certainly had the right to disclose to their principals the information that they secured from their counsel, the Wien firm, relating to the heating oil litigation. DRINKER, LEGAL ETHICS 251 (1953). Indeed, they were under a fiduciary duty to do so.

A managing agent for a cooperative building is an "agent," *Pantekas v. Westyard Corporation*, 44 A. D. 2d

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46. EC 2-3 Whether a lawyer acts properly in volunteering advice to a layman to seek legal services depends upon the circumstances. The giving of advice that one should take legal action could well be in fulfillment of the duty of the legal profession to assist laymen in recognizing legal problems. The advice is proper only if motivated by a desire to protect one who does not recognize that he may have legal problems or who is ignorant of his legal rights or obligations. Hence, the advice is improper if motivated by a desire to obtain personal benefit, secure personal publicity, or cause litigation to be brought merely to harass or injure another. Obviously, a lawyer should not contact a non-client, directly or indirectly, for the purpose of being retained to represent him for compensation.

47. EC 2-4 Since motivation is subjective and often difficult to judge, the motives of a lawyer who volunteers advice likely to produce legal controversy may well be suspect if he receives professional employment or other benefits as a result. A lawyer who volunteers advice that one should obtain the services of a lawyer generally should not himself accept employment, compensation, or other benefit in connection with the matter. However, it is not improper for a lawyer to volunteer such advice and render resulting legal services to close friends, relatives, former clients (in regard to matters germane to former employment) and regular clients.

48. Appellants' reliance on Opinion No. 338 (April 25, 1974) of the New York State Bar Association Committee on Professional Ethics (p. 32) is wholly inappropriate since it deals only with unsolicited advice to a layperson and recognizes an exception for communication to clients.

789, 335 N. Y. S. 2d 128 (1st Dept. 1974), and thus a fiduciary with respect to matters within the scope of the agency relationship. *Elco Shoe Mfrs. v. Sisk,* 260 N. Y. 100, 183 N. E. 191; *Jewett v. Commonwealth Bond Corp.,* 241 App. Div. 131, 271 N. Y. S. 522 (1st Dept. 1934); *In re DeBelardino's Estate,* 77 Misc. 2d 253, 352 N. Y. S. 2d 858 (Surr. Ct. Monroe Co. 1974). Beyond the general duties of good faith and loyalty and the exercise of reasonable care and diligence in handling his principal's affairs, an agent has a specific duty to disclose to his principal all material information which comes to his attention relating to the subject of the agency. *Arbour Heights, Inc. v. Norman,* 39 A. D. 2d 836, 333 N. Y. S. 2d 98 (4th Dept. 1972); *Hurley v. John Hancock Mut. Life Ins. Co.,* 247 App. Div. 547, 288 N. Y. S. 199 (4th Dept. 1936). Thus, in the exercise of good faith and diligence, it is the duty of the agent to use reasonable efforts to keep his principal informed of all facts which may come to the agent's attention concerning matters that have been entrusted to him which affect the principal's business, his rights or his interests. See 2 N. Y. Jur., Agency, § 194, pp. 330-331. Applied to the instant case, the managing agent had a duty to promtly disclose the litigation since it directly involved a subject in which he was charged to act on the behalf of his principal.

The Sulzberger and Elliman companies are not subject to the ABA-New York State Code of Professional Responsibility since they are not lawyers. Moreover, they have done nothing in violation of Section 479 of the New York State Judiciary Law as the language of that statute makes clear. In fact, their challenged activities are specifically permitted under existing decisions of the New York appellate court.[49]

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49. The record indicates that there is no evidence that Brown Harris has sent out any letter to its clients with the information secured from Lippman; therefore, its conduct is not in question on this appeal (279a). Since Brown Harris is a client of Lippman, even if it had sent a letter to its principals it would be in the same position as Sulzberger and Elliman and the discussion in the text would be fully applicable. Both Lippman (281a) and Berger (284a)

The leading New York case on the solicitation of legal business is *People v. Schneider*, 20 A. D. 2d 408, 247 N. Y. S. 2d 623 (1st Dep't 1964). In that case, the defendant, Gale, an insurance broker, had made a number of recommendations of a lawyer to accident clients. The recommendations arose out of Gale's pre-existing relationships with his clients. The New York court specifically declined to condemn Gale's conduct. Justice (now Chief Judge) Breitel carefully distinguished recommendations based on someone's relationship with people who become the attorney's clients from recommendations either based upon prior arrangements to solicit between a lawyer and a layperson or based upon actual or proposed payment of compensation for the referral. The court in *Schneider* stated:

> In this case Gale as an insurance broker sustained a relationship to his insurance clients. On the bare conversations recounted it cannot be said that he was not performing a function directly involved in the advising of his clients in an area not too remote from the subject matter of their relationship. Some were friends. All had been doing business with him for some time. Again, on the bare conversations recounted, it cannot be said that he was stirring up litigation or, with design, systematically soliciting legal business for the lawyers, as distinguished from giving advice to his insurance clients. In short, there was no showing that he was an 'officious intermeddler', that he was abusing a pre-existing relationship, or that he was using the cover of his brokerage relationship to channel legal business to the lawyers. 247 N. Y. S. 2d at 626.

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49. (Cont'd.)
testified that the two law firms had nothing to do with the letter from Karelson III to the Ashforth company, and obviously Karelson's information came from another source, such as the Elliman letter. This being the case, Karelson's conduct cannot be attributed to the Wien or Berger firms and therefore is irrelevant to the solicitation charge.

The *Schneider* case has been followed and approved by the New York Court of Appeals in *Kelly v. Greason, supra.* Plainly, therefore, both the Sulzberger and Elliman companies, who are in an even more immunized position than Gale was in the *Schneider* case, acted well within the scope of activity permitted by New York law, especially since their letters were informational and were not even letters of recommendation.

There is yet another and very fundamental flaw in charging the real estate management companies with improper conduct. Since the Sulzberger and Elliman letters were designed to inform those to whom they had a fiduciary duty of the possibility that they might have claims under the federal antitrust laws against the defendants in this action, they fall squarely within the Supreme Court decisions protecting the constitutional right of organizations and associations to communicate with their members in order to aid them in securing access to the courts and in obtaining effective professional representation. *United Transportation Union v. State Bar of Michigan,* 401 U. S. 576 (1971); *United Mine Workers of America v. Illinois State Bar Association,* 389 U. S. 217 (1967); *Brotherhood of Railroad Trainmen v. Virginia State Bar,* 377 U. S. 1 (1964); *NAACP v. Button,* 371 U. S. 415 (1963). These cases have granted constitutional protection to conduct by laypersons involving the giving of advice relating to legal rights and services that was far more direct and extensive than the writing of the purely informational letters involved in this matter.

C. The Berger Firm Has Not Engaged in Any Improper Conduct.

If the Sulzberger and Elliman companies and the Wien firm did nothing improper, *a fortiori,* the Berger firm's conduct cannot be improper. There has been simply no showing (and there can be no showing) that in some way the Berger firm initiated or participated in a scheme to

solicit clients for the heating oil litigation.[50] The affidavits and the testimony at the oral hearing establish that exactly the opposite is true.

Both Wolfe and Berger have testified unequivocably that the Berger firm had no knowledge of the events leading up to or the circulation of the Sulzberger and Elliman letters until long after they were mailed and had never given authority for such letters to be sent (182a-183a; 187a-188a; 284a-285a; 292a-294a).[51] The Berger firm's only contact with either of the Wien clients was a phone conversation between Wolfe and Sulzberger over six months before the events relevant to this proceeding. In that conversation, Sulzberger requested a description of the litigation and the fee arrangements made with those joining the action. Pursuant to that request, Wolfe, who thought Sulzberger was a lawyer, wrote to Sulzberger

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50. The appellants do not claim that the Berger firm's representation of the actual plaintiffs in these actions, Samuel J. Lefrak, et al., New York City Housing Authority and Rochdale Village, Inc., is in any way related to or the result of the alleged solicitation. Nor has anyone else joined the litigation as a result of the Sulzberger and Elliman letters. Consequently, the disqualification of the Berger firm from continuing to represent clients for whom they were litigating long before the events involved in this proceeding would be wholly improper. It would punish parties who are wholly untarnished by the alleged solicitation by denying them the counsel of their choice. *Ceramco, Inc. v. Lee Pharmaceuticals,* 510 F. 2d 268 (2d Cir. 1975); *Emle Industries, Inc. v. Patentex, Inc., supra; Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., supra; Hull v. Celanese Corp.,* 513 F. 2d 568 (2d Cir. 1975). In the words of Judge Weinstein, in his district court opinion in the *Silver Chrysler* case: "The courts must be cautious not to interfere needlessly with the freedom of litigants to proceed with counsel of their choice * * *." 370 F. Supp. 581, 583 (E. D. N. Y. 1973). See also *Universal Athletic Sales Co. v. American Gym, Recreational & Athletic Equipment Corp.,* 357 F. Supp. 905 (W. D. Pa. 1973).

In any event, the Second Circuit has concluded that disqualification is an inappropriate sanction even when the solicitation results in the bringing of the very action in which disqualification is sought. *Fisher Studio, Inc. v. Loew's, Inc.,* 232 F. 2d 199 (2d Cir. 1956), *cert. denied,* 352 U. S. 836 (1956).

51. The record also makes it clear that the Berger firm had no association with Brown Harris and either of the Karelsons.

describing the litigation and enclosing an unaddressed, and unsigned copy of a fee agreement that had been used in connection with participants already in the litigation. The Berger firm has never had any contact with Elliman (182a, 188a, 296a-297a). There is not one iota of evidence suggesting that that firm authorized, cooperated with, or encouraged Sulzberger or Elliman, in any way, to send letters to the cooperative owners or engage in any other conduct designed to solicit clients in violation of DR 2-103(C) or DR 2-103(D).

Nonetheless, the appellants continue to charge that the Berger firm has engaged in solicitation, insinuating that there is a subterranean arrangement between the Berger firm and the Wien firm. The affidavits and the March 5th hearing make it plain that both firms categorically deny the allegations, and that the Wien firm has never discussed these Wien clients with the Berger firm. Nor has Wien accepted employment or other benefits from Sulzberger, Elliman, or anyone else in connection with this litigation. Accordingly, the Berger firm plainly has not solicited Sulzberger or Elliman in violation of DR 2-103(A) and has not given unsolicited advice to laypeople contrary to DR 2-104(A).

Given the facts on the record, the ethics committee opinions heavily relied on by appellants (pp. 30-33) are totally irrelevant. As Judge Costantino's decision notes (365a-366a), these opinions deal with entirely different situations. They involve attorneys who directly solicited clients, e.g., Opinion No. 8 (May, 1913), Committee on Professional Ethics of New York County Lawyers' Association; Formal Opinion 5 (July 7, 1924), Committee on Professional Ethics of the American Bar Association, or a lawyer who knowingly permitting a grossly exploitive document to be generally circularized by his client, Opinion No. 426 (December 1, 1937), Committee on Professional Ethics of the Association of the Bar of the City of New York, or letters being sent out by a client at the instigation of an attorney,

Opinion No. 4 (March, 1912), Committee on Professional Ethics of the New York County Lawyers' Association.

Moreover, despite appellants' zealot-like conclusory pronouncements about a "letter writing campaign," apparent solicitation," approaching potential plaintiffs on a "wholesale basis," and "widespread efforts to stir up litigation," the record is absolutely barren of anything that would support a finding or even infer a basis for finding that Berger has engaged in any conduct even remotely comparable to what has been insisted upon by the New York courts for a finding of improper solicitation.[52] For example, in *Matter of Shufer*, 12 A. D. 2d 208, 209 N. Y. S. 2d 545 (1st Dep't 1961), a motion for leave to appeal denied, 9 N. Y. 2d 611 (1961), inappropriately relied on by appellants (App. Br. p. 27), the attorney had entered into an arrangement with certain insurance brokers, pursuant to which the latter had agreed to solicit cases for him in exchange for valuable consideration.[53]

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52. The New York State Bar has adopted the ABA Code of Professional Responsibility. *Matter of Daniels*, 36 A. D. 2d 208, 319 N. Y. S. 2d 648 (4th Dep't 1971).

53. See also *Kelly v. Greason, supra* (no evidence that referrers had done anything more than answer requests by victims of automobile accidents for a recommendation as to a lawyer; no solicitation); *Matter of Marino*, 20 N. Y. 2d 176, 282 N. Y. S. 2d 230 (1967) ("pattern of systematic solicitation of automobile negligence business by utilizing * * * relationships with doctors, insurance brokers, and body shops as a cover for directing legal business to them"); *Matter of Weber*, 26 A. D. 2d 565, 270 N. Y. S. 2d 822 (2d Dep't 1966) (systematic solicitation; prior arrangement with referrer); *In re Fata*, 22 A. D. 2d 116, 254 N. W. S. 2d 289 (1st Dep't 1964) (numerous retainers referred by several people); *In re Breiterman*, 22 A. D. 2d 553, 257 N. Y. S. 2d 216 (1st Dep't 1965) (unusual number of cases referred * * * "spelling out a plan"); *In re Kreisel*, 21 A. D. 2d 431, 250 N. Y. S. 2d 1001 (1st Dep't 1964) (mass solicitation of retainers; large numbers of referrals; free legal services to referrers; disproportionate entertainment expenses); *Matter of Feldman*, 17 A. D. 2d 553, 237 N. Y. S. 2d 170 (1st Dep't 1963) (clear proof of direct and indirect solicitation); *In re Ariola*, 252 App. Div. 61, 297 N. Y. S. 100 (1st Dep't 1937) (active solicitation); *In re Mahan*, 228 App. Div. 241, 239 N. Y. S. 392 (1st Dep't 1930) (acceptance of more than 200 cases a year from one referrer).

Collectively, these cases establish the following conditions for a finding of solicitation by a New York court: (1) active solicitation by an attorney; or (2) a prior arrangement for solicitation between an attorney and one or more non-lawyers and actual recommendations resulting from that arrangement; or (3) a showing that compensation has been paid in connection with a particular recommendation; or (4) systematic, numerous recommendations giving rise to an inference that a pre-existing relationship between the referrer and those solicited has been used "as cover for directing legal business" to an attorney. No New York case has been discovered in which solicitation was held to have occurred without one of these factors being present and none of the cases cited in appellants' brief (App. Br. 27) suggests otherwise. None of these factors are present in the instant matter.[54]

D. Nothing in the Record Justifies Further Investigation of the Unfounded Charges Against the Berger Firm.

Given the state of the record, it really is Kafkaesque for appellants to suggest that the Wien firm, one of the largest and most highly reputed real estate law practices in the country, of which Sulzberger and Elliman were important clients, was a "cover for directing legal business" to the Berger firm within the meaning of *People v. Schneider, supra*. Yet the appellants, by pursuing this appeal and filing a brief filled with distortions and disparaging innuendos, imply precisely that.

In light of the complete disclosure and clarity of the facts concerning the circumstances of the Sulzberger and

54. For example, in *Matter of Marino, supra,* the New York Court of Appeals held that there was a prima facie case of solicitation when 104 clients in separate matters were referred and the referrals came from several persons. By way of contrast, in *Kelly v. Greason, supra,* 36 referrals were held to be insufficient. In the present case, solicitation was alleged to have taken place with regard to a single antitrust action by the writing of letters by real estate management firms that were under a fiduciary obligation to do so.

Elliman letters and the unequivocal testimony of four attorneys that no wrongdoing has taken place, Judge Costantino's findings are invulnerable. Furthermore, appellants' brief offers nothing to suggest any rational basis for finding error, let alone an abuse of discretion, that could conceivably justify protracting this diversionary proceeding further. Nor have they offered anything beyond the conclusory demand for a "full and vigorous investigation" indicating that further inquiry would be productive.[55]

Suspicions are not enough to justify a remand. Appellants must discharge a heavy burden of persuasion before this court should accede to their loosely disguised request for an extravagant diversion collateral to the main, important litigation. They have completely failed to do so. Accordingly, we respectfully request that this court put the matter to rest before any additional delay in the disposition of this important litigation is caused by appellants' unfounded accusations.

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55. In reality, Exxon's brief is little more than a series of quarrels with Judge Costantino's findings. Rather than identifying legitimate and material unexplored areas worth investigating, it simply attempts to show that the court below should have seen the ghosts and goblins of solicitation in the evidence that was presented. As appellee's counter-statement of the case and legal arguments demonstrate, each of Judge Costantino's findings is fully supported in the record and there is no basis for concluding that he abused his discretion in any way.

CONCLUSION.

The record below demonstrates that Judge Costantino engaged in a full and vigorous investigation of appellants' claims which produced disclosure of all relevant facts. Therefore, the order and opinion of Judge Costantino must be affirmed.

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In The
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SAMUEL J. LEFRAK, et. al., Plaintiffs-Appellees, v. ARABIAN AMERICAN OIL COMPANY, et. al., Defendants-Appellants.	Docket No. 75-7234
ROCHDALE VILLAGE, INC., Plaintiff-Appellee, v. ARABIAN AMERICAN OIL COMPANY, et. al., Defendants-Appellants.	Docket No. 75-7235
NEW YORK CITY HOUSING AUTHORITY, Plaintiff-Appellee, v. ARABIAN AMERICAN OIL COMPANY, et. al., Defendants-Appellants.	Docket No. 75-7236

PROOF OF SERVICE

I, Sherrie Raiken Savett, Esquire, attorney for appellees herein, Samuel J. Lefrak, et. al., Rochdale Village, Inc. and New York City Housing Authority, hereby certify that on the 8th day of August, 1975, I caused to be served by hand delivery to their offices, two copies of the Brief of Plaintiffs-Appellees to the following persons:

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